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In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT No. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF THE LANDMARK LEGAL FOUNDATION CENTER FOR CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE LANDMARK LEGAL FOUNDATION CENTER FOR CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core principles of civil rights: equality under law and individual liberty.

A vital aspect of this mission is the pursuit of equal educational opportunities. We represent parents, schoolchildren, and teachers in a variety of cases raising issues of equal educational opportunities and educational choice.

We are joined as co-counsel by a number of distinguished law professors who share our conviction that the decision under review in this case is incompatible with fundamental principles of justice and with sound public policy.

SUMMARY OF ARGUMENT

In a very real sense, the appearance of this case and others like it[1] before this Court is a cause for celebration – specifically, a celebration of the triumph of our nation's most cherished principles. These cases mark an important epoch in America's quest to make good on its commitment to civil rights, for they present the question not of how to remedy discriminatory educational systems, but rather what happens when that task is accomplished.

This case does not require the Court to make new law, but merely to apply well-established equitable principles. The dispositive principle in this case is that the

[1] The three other cases pending on petitions for writs of *certiorari* include *Keyes v. School District No. 1 Denver, Colorado*, 895 F.2d 659 (10th Cir. 1990), *petition for cert. filed*, No. 89-1698; *Brown v. Board of Educ. of Topeka*, 892 F.2d 851 (10th Cir. 1989), *petition for cert. filed*, No. 89-1681; *Pitts v. Freeman*, 887 F.2d 1438 (10th Cir. 1989), *petition for cert. filed*, No. 89-1290.

scope of judicial remedies is defined and limited by the scope of the constitutional violation.

Mandatory busing is harsh medicine even in its limited role as a remedy for egregious violations of constitutional rights. However critical the need to employ extraordinary remedies, just as vital is the necessity to restrict such measures to extraordinary circumstances. For coercive measures such as busing that displace community control over education can detract substantially from the educational mission, to the detriment of the very youngsters they are intended to benefit. Accordingly, such measures should seek to spend themselves as quickly as possible so as to return discretion to those entrusted with the high responsibility of educating our children.

As two scholars who have studied extensively the impact of sustained busing in a community have observed, "The politics of race can only end when . . . people no longer think of themselves in racial terms above all else, but identify themselves first as parents or teachers, . . . and only secondarily as black or white. . . ." R. Pride and J. Woodard, *The Burden of Busing* 283 (1985). The Court can hasten the arrival of that day by limiting the use of coercive race-based remedies to the most extraordinary circumstances, and by allowing communities that have accomplished the task of desegregation to turn their attention to the task of pursuing educational objectives in a race-neutral fashion.

ARGUMENT

I. THE REMEDIAL AUTHORITY OF THE COURTS MUST END WHEN A SCHOOL DISTRICT ASSURES THAT EDUCATIONAL OPPORTUNITIES ARE AVAILABLE TO ALL ON EQUAL TERMS.

At issue here is the question of when, if ever, judicial supervision of a "unitary" school system ceases. The Tenth Circuit, in its decision below reversing the contrary ruling of the district court, departed from well-established equitable principles when it ruled, in essence, that formerly segregated school districts must permanently retain coercive measures designed to maximize racial balance.

The constitutional right at stake in school desegregation cases is "the opportunity of an education . . . available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The vindication of this right throughout an entire school district represents the attainment of "unitary" status – what one court has aptly called "the 'accomplishment' of desegregation." *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987).

This Court has carefully delineated the authority of courts to engage in remedial action in the desegregation context. "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

The Court has established a number of specific limitations to ensure that desegregation decrees are tailored to the scope of the violation. First, judicial remedies are

permissible only upon a finding of causation; racial imbalance cannot justify a race-conscious remedy unless the "school authorities have in some manner caused unconstitutional segregation." *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1975). Second, coercive race-conscious remedies should play as limited a role as possible in the desegregation process. Thus, this Court has approved "the very limited use . . . of mathematical ratios" only as "a starting point in the process of shaping a remedy, rather than as an inflexible requirement." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). Third, the Court repeatedly has stressed that the remedial goal is desegregation, not racial balancing. "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. Finally, once the indicia of past discrimination are removed from a dual school system, courts are "not entitled" to take further steps "to ensure that the racial mix desired by the court [is] maintained in perpetuity." *Spangler*, 427 U.S. at 436.

Once unitary status is attained, the predicate for further relief ends. Thereafter, remedial relief is permissible only if the school district "deliberaterly attempt[s] to fix or alter demographic patterns to affect the racial composition of the schools. . . ." *Swann*, 402 U.S. at 32; *accord*, *Spangler*, 427 U.S. at 435.

In conformity with these standards, the Fourth Circuit has held that once the underlying violation is cured, as reflected by the attainment of unitary status, the trial court is without authority to make further orders. *Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 535 (4th

Cir.), *cert denied*, 479 U.S. 938 (1986). More specifically, the First Circuit has ruled that unitariness triggers the "*mandatory* devolution of power to local authorities," *Morgan*, 831 F.2d at 318 (emphasis in original); and that once the school district has achieved desegregation goals in any facet of its school system, the Court may not "perpetuate an injunction requiring adherence to a particular formula" in that area. *Id.* at 326. The Fifth Circuit likewise has adopted this approach. *United States v. Overton*, 824 F.2d 1171 (5th Cir. 1987).

Were Oklahoma City in any other circuit, this case would not have appeared before this Court in its current posture. By any reasonable measure, the school district here has earned the right to pursue its educational mission free from judicial control, precisely the conclusion reached by the district court in this case.

The Oklahoma City school district was declared unitary in 1977, following an evidentiary hearing in which the district court found that the Finger Plan, a comprehensive remedial program that included massive cross-town busing, had eliminated all vestiges of state-imposed racial discrimination (App. 2a). The court entered an order declaring:

> Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

Id. At that time, the district court relinquished jurisdiction over the case and returned the responsibility for race-neutral educational decisions to the Board of Education of the Oklahoma City Public Schools.

For eight years following the unitary declaration, the Oklahoma City School Board continued to implement the Finger Plan. In 1984, however, it became apparent that demographic changes had taken place within the school district and that the Finger Plan, if continued on the elementary level, would increase the burden of busing on young black children in grades K-5 and lead to the closure of a large number of schools in a predominantly black area of the city. In response, the school board adopted a Student Reassignment Plan, which was implemented for the 1985-86 school year. The plan eliminated compulsory busing in grades one through four and reassigned elementary students to their neighborhood schools, which resulted in the existence of a number of heavily black schools. The board retained a "majority to minority" transfer option which allowed students assigned to a school in which they were in the majority race to transfer to a school in which they would be in the minority. The new plan also appointed an "equity officer" who, assisted by an equity committee, would monitor all schools to insure the equality of facilities, equipment, supplies, books, and instructors (App. 5a).

Although the district court upheld this plan, finding that it was nondiscriminatory and served valid educational objectives (App. 17-19a), the Tenth Circuit reversed. Viewing the Finger Plan as a permanent

injunction, the court placed the burden on the school district to demonstrate changed circumstances to justify modification of the injunction (App. 14a). The court concluded that the district failed to carry its burden, in part because continued residential racial imbalance caused similar racial imbalance in the schools (App. 19a).

The Tenth Circuit's rule that coercive desegregation measures are in the nature of a permanent injunction and modifiable only by ~~a showing~~ of significantly changed circumstances amounts to a radical departure from desegregation jurisprudence. By sanctioning a remedy virtually without end, the Tenth Circuit's rule, by definition, far exceeds remedial authority as limited by the scope of the constitutional violation. As the Fifth Circuit has observed, the "difficulty with *Dowell's* approach is that it denies meaning to unitariness by failing even to end judicial superintendence of schools." *Overton*, 824 F.2d at 1175.

The Tenth Circuit's rule upsets as well the specific boundaries of permissible judicial action established by this Court. Its requirement of permanent adherence to racial ratios confuses the constitutional right to equal educational opportunities with the objective of racial balance, an approach this Court has warned "would be disapproved and [which] we would be obliged to reverse." *Swann*, 402 U.S. at 24. It seeks to hold the school district responsible for residential racial imbalance despite the absence of any showing that it is "in any manner caused by segregative actions chargeable" to the district. *Spangler*, 427 U.S. at 435. In sum, the Tenth Circuit's imposition of extraordinary remedial measures long after the wrong has been righted amounts to "a heady call for raw judicial power." *Overton*, 834 F.2d at 1176.

The Tenth Circuit attempts to rationalize its sweeping departure from well-established remedial principles by invoking the procedural cover of a permanent injunction. A court may not, however, evade limitations on its power by emphasizing form over substance. As the other circuits that have considered this issue have concluded, affirmative relief is no longer warranted – or authorized – when unitary status is achieved. *See e.g., Morgan, Riddick,* and *Overton, supra.* To state it in the vernacular of an injunction, the "changed circumstance" justifying the termination of injunctive relief is unitary status; and a significant change it is, for it means that the dual system of education no longer exits.

In a very real sense, school districts that have attained unitary status *do* operate under a permanent injunction: the constitutional command of nondiscrimination. Any individual is free to challenge school district policies as intentionally discriminatory. This prospect provides a sufficient safeguard to ensure that school district will not once again adopt discriminatory practices, and to ensure swift and meaningful relief if they do. In sum, the rule this Court should ratify is that *the only choice denied to a unitary school district is the choice to discriminate.*

The necessity of removing the scarlet "S" from school districts that have accomplished the difficult task of achieving a unitary educational system is supported as well by the societal interest in encouraging districts to undertake such efforts. As the Fifth Circuit has remarked, "The carrot of unitariness can be a meaningful incentive for school districts to desegregate only if we abide by our promise to release federal control once the job is done."

Overton, 834 F.2d at 1176. For Oklahoma City, which has successfully travelled the road to unitary status, the time has come for the court to return to the community the power to act in the best educational interests of its children.

II. EXPERIENCE DEMONSTRATES THAT LONG-TERM COERCIVE MEASURES DESIGNED TO MAINTAIN RACIAL BALANCE ARE INCONSISTENT WITH THE OBJECTIVE OF EQUAL EDUCATIONAL OPPORTUNITIES.

Equitable principles do not develop in a vacuum. They reflect centuries of acquired wisdom and experience with respect to the appropriate nature and extent of judicial interventions in personal disputes and societal ills. Departures from these principles thus can produce unexpected and tumultuous consequences. This risk is nowhere more pronounced than in the context of school desegregation, which affects directly the lives and opportunities of our nation's most precious resource: its children.

A growing consensus is developing among scholars, education officials, and parents that forced busing detracts from the educational mission. Though strongly committed to equal opportunities for all youngsters, many thoughtful individuals have concluded that such opportunities are not optimally served by measures that, in the words of columnist William Raspberry are "almost monomaniacally concerned with the maximum feasible mixing of races, with educational concerns a distant second." Raspberry, "The Easy Answer: Busing," *Washington Post*, Apr. 20, 1985, at A23. A number of factors associated

with busing contribute to these concerns, among them the phenomenon of "white flight," the cost and disruption of busing, and the availability of sound educational alternatives. We express no opinion on the salience of these factors in any given situation; we are attorneys, not social scientists. Our point is simply this: once a school district has purged itself of a segregated school system, it should once again have the discretion to act in the best educational interests of its children.

In this case, the Oklahoma City School District determined that the burden of busing borne by young black students was too great. It concluded that neighborhood schools – enhanced by an "effective schools" program and combined with the opportunity to transfer – would improve educational opportunities for these youngsters. The notion that this policy reflected a return to a dual system was rejected by the district court as "ludicrous and absurd" (App. 44b).

Under these circumstances, this conclusion is certainly unremarkable. What is remarkable, however, is the Tenth Circuit's insistence on adherence to racial balance as the permanent touchstone of a unitary school system's educational policies. As we show below, numerous legitimate justifications exist for school districts to pursue objectives other than racial balance. Indeed, a judicial rule that prohibits or discourages alternatives may harm most severely those who are the intended beneficiaries of desegregation.

A. White Flight. A major problem endemic to mandatory busing plans is white flight – the loss of middle-class white students who move away or enroll in private

schools. *See e.g., Riddick, supra* (approving school system's return to neighborhood schools due in part to white flight). The deleterious impacts of white flight are felt most strongly by the black youngsters left behind.

Most studies on white flight "concur that larger, central-city school districts with sizable minority enrollments experience significant long-term white flight following mandatory busing plans." D. Armor, "School Busing," in Katz and Taylor, eds., *Eliminating Racism* 266 (1988). White flight today appears to be caused more by educational concerns than by racism: in Los Angeles, where busing resulted in massive white flight, rates of white withdrawal were essentially unchanged regardless of whether the new assigned schools were predominantly white, black, or Hispanic. *Id.* at 269.

White flight is harmful primarily in two ways. First, it frustrates the objectives of desegregation. Although "mandatory [busing] plans do the best job of producing racial balance," observes social scientist David J. Armor, they do so "usually only at the cost of converting all schools to predominantly minority status." *Id.* at 270-271. Thus, "mandatory busing has aggravated the growing racial isolation" of many cities. *Id.* at 271.

A second consequence of white flight is the loss of vital community support for public schools. In their study of the impact of long-term busing in Nashville, Richard A. Pride and J. David Woodard found that white flight

> was a significant and continuing problem. . . . Traditionally, the white middle class had been the public schools' strongest ally; its members had supported the schools politically, financially, and, through countless hours of volunteer labor, personally. Without their strong support, the public schools could slip into mediocrity or worse.

Pride and Woodard at 141. An overwhelming majority of whites and a large plurality of blacks in Nashville expressed the view[2] that community support would return following a restoration of neighborhood schools. *Id.* at 153.

Given the reality of white flight, a school board could reasonably conclude that mandatory busing thwarts effective desegregation and reduces prospects for quality schooling, particularly for poor youngsters. Unitary school districts therefore should have discretion to deal with such problems.

B. Black Flight and the Burden of Busing on Blacks. Justice Powell observed that "[a]ny child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school, suffers an impairment of his liberty and privacy." *Keyes*, 413 U.S. at 247-248 (Powell, J., concurring in part and dissenting in part). Black children, in particular, "for years have borne the heaviest personal cost of desegregation by enduring long bus rides, separation from familiar surroundings, and curtailment of extracurricular activities." National Institute of Education, *School*

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[2] Surveys were taken on various educational issues in Nashville between 1977-1981 after several years of court-imposed busing.

Desegregation and Black Achievement 43 (1984) [henceforth "NIE Study"].

Moreover, "abandonment of neighborhood schools tends to limit parental participation in, and supervision of, the operation of the school system and lessens the importance of the school as a center of community concern and cohesion." *Keyes*, 413 U.S. at 246 (Powell, J.). This diminished parental involvement is potentially devastating to black educational achievement, since studies show a strong correlation between parental involvement and higher student grades and test scores, positive student attitudes and behaviors, and improved school atmospheres. Jennings, "Studies Link Parental Involvement, Higher Student Achievement," *Education Week*, April 4, 1990, at 20.

Little wonder then that black parents are growing increasingly skeptical about busing. As Pride and Woodard found in Nashville, "adults of *both* races believe that busing is unfair," but such feelings "may be especially acute among blacks, the very group the policy was designed to help." *Id.* at 284. Surveys in Nashville revealed that 58% of black parents believed busing was harmful to the educational development of white and/or black school children, *id.* at 151; and that 38% of black parents would enroll their children in private schools if they could afford to do so. *Id.* at 153. A study in Boston found that 75% of black parents involved in busing would prefer their children attend neighborhood schools of equal quality. Cuddy, "A Proposal to Achieve Desegregation Through Free Choice," *American Education*, May 1983, at 28-29.

Understandably, a sizable "black flight" away from inner-city public schools has taken place in many cities. Fully half the students in urban private schools (including Catholic schools) are black, and another third are Hispanic. Moreover, half of urban private schools families are low-income. See C. Bolick, *Changing Course: Civil Rights at the Crossroads* 108 (1988). In many private schools, "low socioeconomic status minority youth are scoring above the national average on standardized tests." Cuddy at 26. Busing appears both a cause of the desire of many black families to seek alternatives, as well as an impediment to school districts in responding to those desires.

The disproportionate burden of busing shouldered by black youngsters thus provides a legitimate basis for educational decisionmakers to reject racial balance policies in favor of those that expand choices or improve educational quality.

C. Effects on Education Achievement: Although busing is costly in many ways,[3] it provides few, if any, offsetting educational benefits, particularly for its intended beneficiaries. Despite nearly three decades of forced busing, "there remains a persistent and large gap" between black and white students in achievement test scores, high school dropout rates, and college attendance

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[3] As Justice Powell remarked, "At a time when public education is suffering serious financial malnutrition, the economic burdens of [busing] may be severe, requiring both initial capital outlays and annual operating costs in the millions of dollars." *Keyes*, 413 U.S. at 248 (Powell, J.). See also L. Graglia, *Disaster by Decree* 264 (1976).

and completion rates. Committee on the Status of Black Americans, *A Common Destiny* 378 (1989). The "assumption that integration would improve achievement of lower class black children has now been shown to be fiction," according to James Coleman, whose 1966 study was cited by many advocates of busing. See Cuddy at 26.

The NIE Study on desegregation and black achievement,[4] which produced "the most comprehensive and in-depth treatment of the issue ever," reached "a definitive conclusion: desegregation has small positive effects on black student achievement in reading and no effects on black achievement in math." *See* Ascik at 19. Even more to the point, academic gains took place in school districts with *voluntary* desegregation programs, while those with *mandatory* plans reported either no gains or actual losses in black student achievement. NIE study at 26. Other studies have found that black students' educational and occupational aspirations remained equal or fell below those of whites following desegregation, and that blacks in non-integrated schools have higher self-esteem than blacks in integrated schools. *See* Committee on the Status of Black Americans at 373-374.

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[4] The NIE study was conceived as "a way to reconcile the disagreements" among social scientists on this issue. The study was conducted by seven distinguished social scientists who previously had reached divergent findings. The study produced "remarkable convergence about the fundamental question." *See* Ascik, "An Investigation of School Desegregation and Its Effects on Black Student Achievement," *American Education*, December 1984, at 17.

As David Armor has concluded, these findings raise

> serious questions about compulsory desegregation methods such as mandatory busing. There is little justification for forcing . . . children into expensive, time-consuming cross-town bus rides when there is no educational advantage. . . . It should be made clear to all . . . that simply changing to schools that are more racially balanced than one's neighborhood school is no guarantee of a superior education. Indeed, they may be giving up possible advantages of special programs in their own school – programs designed specifically to enhance education and proven to work.

NIE Study at 60-61. The overwhelming weight of the data thus suggests that policies designed primarily to promote racial balance do nothing to promote – and may in fact inhibit – efforts to improve educational quality.

D. Availability of Sound Educational Alternatives. The failure of forced busing has prompted many advocates of expanded educational opportunities for blacks to call for a different approach. Derrick Bell, among others, has called for "educationally oriented relief" for past racial discrimination that embraces policies that provide "real opportunities for blacks without the cost and disruption of busing." Bell, "Civil Rights Commitment and the Challenge of Changing Conditions in Urban School Cases," in A. Yarmolinsky, L. Liebman, and C. Schelling, eds., *Race and Schooling in the City* 201 (1981).

Essential elements of successful programs for disadvantaged minority students include school leadership, parental participation, and teacher accountability. *Id.* Policies geared to improved quality of instruction, classroom

morale, and stimulation in the home environment, concludes Herbert J. Walberg, are far preferable to racial balancing, which "does not appear promising in the size or consistency of its effects on learning of Black students." NIE Study at 187.

What now appears clear is that neighborhood schools can provide high-quality educational opportunities even if they are not racially balanced. *See, e.g.*, Bell at 201. Moreover, a number of wide-ranging reforms offer significant potential for improving educational quality and expanding opportunities, such as magnet schools,[5] "controlled choice,"[6] district-wide open enrollment with transportation,[7] metropolitan area-wide or statewide open enrollment, and vouchers.[8] The State of Wisconsin recently adopted a voucher program for Milwaukee's most economically disadvantaged students, providing free choice among nonsectarian private schools.[9] Alternatives like these demonstrate that school officials acting in good faith have a wide variety of options at their disposal

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[5] *See, e.g.* Bennett, "A Plan for Increasing Educational Opportunities and Improving Racial Balance in Milwaukee," in Willie and Greenblatt, *School Desegregation Plans That Work* 81 (1984).

[6] *See, e.g.* Alves and Willie, "Controlled Choice Assignment: A New and More Effective Approach to School Desegregation," 19 *Urban Review* 67 (1987).

[7] *See, e.g.* Cuddy, *supra*.

[8] Armor, "After Busing: Education and Choice," *Current*, October 1989, at 18-20.

[9] *Wisc. Stat.* § 119,23 (1990); *see also* William Snider, "Voucher System For 1,000 Pupils Adopted in Wisconsin," *Education Week*, March 28, 1990.

to make "the opportunity of an education . . . available to all on equal terms." *Brown*, 347 U.S. at 493.

E. A Unitary School District Reasonably May Consider These Factors in Determining Educational Policies. The sum of the evidence strongly suggests that "plans that mandatorily assign students to schools outside of their immediate neighborhoods tend to destabilize over time and have no inherent educational value." Alves and Willie at 70. Policymakers legitimately may respond to this evidence in any number of ways; what is essential is that they have the discretion to do so. If unitary status means anything, these real-world considerations compel it to mean that school districts once again may turn their primary focus toward educational objectives rather than racial balance.

These are precisely the type of factors the Oklahoma City school board took into account when it adopted its revised plan. The district considered the desirability of parental and community involvement that a partial return to neighborhood schools would produce (App. 26b-28b). It considered the burden that would be borne primarily by black students in continuing a forced busing plan at the first-through-fourth grade levels (App. 7a). In returning to neighborhood schools at these grade levels, the district provided to parents the option to exercise "majority to minority" transfers (App. 4a-5a). The district also has operated an "effective schools" program that has "resulted in overall academic gains at 8 of the 10 predominantly black elementary schools exceeding the average gains made by black children nationally," placing the school district "well on its way to becoming a nationally recognized model urban school district" (App. 43a). All

of these factors convinced the district court that no further coercive measures were necessary.

Given its sustained and successful efforts in eradicating its prior dual educational system, an order prohibiting Oklahoma City from acting in ways that are demonstrably in the best educational interests of its schoolchildren turns the notion of equity on its head. Bigots no longer control the Oklahoma City schools; people who have demonstrated their commitment to equal educational opportunities do. The time has arrived for courts to recognize that in some places, like Oklahoma City, times have changed.

The critical flaw of the Tenth Circuit's decision in this case is that it lost sight of the fact that schoolchildren are the intended beneficiaries of school desegregation, and that their protected right is equal educational *opportunity*. That right is subverted by a judicial rule that makes racial balance rather than educational opportunities the permanent primary governing principle in a school system.

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the decision of the Tenth Circuit.[10]

Respectfully submitted,

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[10] We also ask the Court to grant *certiorari*, and to reverse and remand in light of its decision in the instant case, the decisions of the Tenth Circuit cited in footnote 1, *supra*, presenting unitary status issues in the Denver and Topeka desegregation cases.